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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM S. JOHNSON,

Petitioner,

vs.

CENTRAL VALLEY SCHOOL DISTRICT NO. 356,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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November 5, 1982

Questions Presented

1. Whether the Indian "preference" in employment provided by the Indian Self Determination and Educational Assistance Act, 25 U.S.C. Sec. 450e(b) requires a state school district to hire a qualified Indian applicant over a better qualified non-Indian applicant for an Indian Tutor-Counselor position where such position is funded under an Indian Education Act (20 U.S.C. Sections 241aa - ff (Supp. 1972)) grant for the benefit of Indian children?

2. Whether the failure of an Indian Education Act grant to specifically condition the grant on compliance with a specific definition of "Indian preference" under 25 U.S.C. Section 450e(b) of the Indian Self Determination Act renders such preference requirement inapplicable under this Court's decision in **Pennhurst State Sch. & Hosp. v. Halderman**, 451 U.S. 1 (1981)? Does it make any difference if the grantee knew "Indian preference" was required and advertised the employment position accordingly?

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WILLIAM S. JOHNSON,

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CENTRAL VALLEY SCHOOL DISTRICT NO. 356,

Respondent

The petitioner, WILLIAM S. JOHNSON, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on June 3, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, reported at 97 Wn.2d 419, 654 P2d 1088, appears as Appendix "A". That Court's order denying petitioner's motion for reconsideration appears as Appendix "B".

JURISDICTION

The opinion of the Supreme Court of the State of Washington was entered June 3, 1982. Timely motion for reconsideration was denied August 17, 1982. The Mandate of the Supreme Court of the State of Washington reflecting that the opinion of the Court became the decision terminating review on August 17, 1982, appears as Appendix "C" and this Petition for Certiorari will have been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

FEDERAL STATUTES INVOLVED

25 U.S.C. Section 450a provides:

Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of education as well as other Federal services to Indian communities so as to render such services responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

(Pub. L. 93-638, Sec. 3; 88 Stat. 2203)

25 U.S.C. Section 450e provides, in relevant part:

Wage and labor standards and preference requirements for contacts or grants

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(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934, as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible - -

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcon-

tracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.

(Pub. L. 93-638; Sec. 7; 88 Stat. 2205)

20 U.S.C. Section Section 241aa provides, in relevant part:

Congressional declaration of policy

(a) In recognition of the special educational and culturally related academic needs of Indian students in the United States, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies to develop and carry out the elementary and secondary school programs specifically designed to meet these special educational or culturally related academic needs, or both. (. . .)

(Pub. L. 95-561, Title XI, Sec. 1142(a); 92 Stat. 2329)

* * *

20 U.S.C. Section 241dd provides, in relevant part:

(b) An application by a local educational agency or agencies for a grant under this subchapter may be approved only if it is consistant with the applicable provisions of this subchapter and

(1) meets the requirements set forth in subsection (a) of this section;

(2) provides that the program or project for which application is made - -

(A) will utilize the best available talent and resources (including persons from the Indian community) . . .

(Pub. L. 95-561, Title XI, Sec. 1144; 92 Stat. 2329)

STATEMENT OF THE CASE

Petitioner, William Johnson, is one-quarter Montouk Indian of the Brotherton Tribe. (CP 34; Ex. 1; RP 124)[1] In August, 1980 Mr. Johnson applied for employment with Central Valley School District No. 356 ("District") for the position of Indian Tutor-Counselor. (Ex. 22; CP 42 - Find. of Fact XVII) This position was funded by a Federal grant under the Indian Education Act (20 U.S.C. Section 241 aa-ff (Supp. 1972)). Among approximately nine applicants for this job only Mr. Johnson was of Indian descent. (CP 42-43; Find. of Fact XVIII) Ultimately, two of the applicants, Mr. Johnson and a non-Indian, Mr. Covella, were considered for the position. (CP 42-43 - - Finds. of Fact XVIII, XIX) Mr. Johnson was not hired. (RP 146-47)

Mr. Johnson commenced an action in state superior court against the School District for money damages and injunctive relief. (CP 1-4; 8; 10) He alleged five claims for relief. (**Id.**) Four of these claims asserted violations of state law and the fifth alleged a violation of 25 U.S.C. Sec. 450e(b) of the Indian Self Determination and Educational Assistance Act,[2] for failure of the School District to comply with the "Indian preference" requirement of that provision. (CP 1-4; 8; 10)

After trial on the merits, the trial court found against Mr. Johnson on all state claims but ruled for Petitioner on his federal claim for violation of the "Indian

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[1]"CP" refers to the Clerk's Papers, the pleadings, etc., of record before the State Supreme Court. "RP" refers to the verbatim Report of Proceedings of the trial, also of the record below.

[2]This Act is hereafter referred to as the Indian Self Determination Act.

preference" requirement. (CP 46; 50-51) The court specifically found:

> In their determination regarding whether to hire Mr. William Johnson or Peter Covella for the position of Indian counselor-tutor with defendent School District, the Executive Committee of the Native American Advisory Committee, Neil Prescott, Charles Stocker, and derivatively, the Board of Directors of Central Valley School District, used an erroneous definition of "Indian Preference". This Court finds that in order to effectuate the congressional intent and underline legislative policy of the Indian Education Act and the Indian Self-Determination Act, the concept of "Indian Preference" to the "greatest extent possible [sic]," requires, in this instance, that if a person of Indian origins meets the qualifications for the position that person must be offered such position even if there are more qualified persons o[f] non-Indian descent.

(CP 46; Find. of Fact XXIV). It awarded Mr. Johnson limited damages and ordered the School District to hire him as Indian tutor-counselor for the next ensuing school year. (CP 54-55)

Both sides appealed. (App. A at 18) Mr. Johnson challenged denial of three of the state claims and the failure of the court to award certain additional relief. (Id.) The School District challenged, as it did below, the superior court's jurisdiction to entertain the federal claim, and its interpretation of the "Indian preference" requirements. (CP 51; 54) The Washington Supreme Court reversed. In so doing, the Court upheld dismissal of the state claims and addressed the federal claim on the merits, concluding the "preference" provision of the Indian Self Determination Act had not been violated and the School District's actions were proper. The

Washington Supreme Court concluded, without discussion, the federal cliam was cognizable in the state court. (App. A) Although the state claims for relief were resolved solely on the basis of state law, including the issue of the timeliness of additional certification required for counselors, resolution of the federal question of "Indian preference" was based entirely on analysis of the substantive law under the relevant federal statutes and this Court's decisions regarding Indian rights.[3]. (**Id.**)

The facts set forth in the opinion of the Washington Supreme Court, Appendix A, pp. 15-18, **post** are accurate and incorporated by reference.

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[3]Review of the Washington Supreme Court's decision reflects the timeliness **vel non** of Mr. Johnson's receipt of his state counselor's certificate was dispositive of several state claims. However, this issue surfaces only **after** discussion and resolution of the federal claim. The Court does not state or imply that any lack of certification was an adequate and independent state ground in deciding the Indian preference claim. Had certification been deemed a threshold question as to the Indian preference claims presumably it would have been treated as such. Further, if Indian preference had been recognized, the Court may then have concluded that had the School District timely acknowledged its obligation to hire Mr. Johnson, on or about August 10, 1979, the actual certificate would have been received before commencement of the school term, and sided with case authority finding that sufficient. **See, Johnson v. Central Valley School Dist.**, 97 Wn.2d 419, 421, 432, 654 P.2d 1088 (1982); (RP 200-219; 256-57; Ex. 24; CP 42-44; Supp. CP 34-48). Such a result would be a consonant with the "greatest extent feasible" requirement of 25 U.S.C. Sec. 450e(b).

Since no adequate and independent state ground is present in the State Court ruling on the federal question Petitioner meets this Court's requirements set forth in **Herb v. Pitcairn**, 324 U.S. 117 (1944). **See, Zacchini v. Scripps-Howard Broadcasting Co.**, 433 U.S. 562, 568 (1977).

REASONS FOR GRANTING THE WRIT

In **Morton v. Mancari**, 417 U.S. 535 (1974), this Court upheld a statutory employment preference for qualified Indians in the Bureau of Indian Affairs in light of the "unique legal status" of Indians in this country. The Court concluded:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such judgments will not be disturbed.

417 U.S. at 555. **See also, Mescalero Apache Tribe v. Hickel**, 432 F.2d 956 (10th Cir. 1970), **cert. denied**, 401 U.S. 981 (1971).

Subsequently, in 1975, Congress enacted the Indian Self Determination Act, 25 U.S.C. 450 et. seq. (1975). In recognition of "the strong expression of the Indian people for self-determination" Congress committed itself to

> the establishment of a meaningful Indian self-determination policy which will permit the orderly transition from Federal domination of programs and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services.

25 U.S.C. Sec. 450a.

As one means of effectuating this policy of self-determination Congress affirmatively required, **inter alia**, that in any contract or grant under the Indian Self Determination Act "or any other Act authorizing Federal contracts [or] . . . grants for the benefit of Indians" that ". . . to the greatest extent feasible . . . preferences . . . for . . . employment in connection with the administration of such contracts or grants shall be given to Indians . . .". 25 U.S.C. 450e(b) To Petitioner's

knowledge this is the first case to reach this court involving interpretation and application of these off-reservation, non-Indian service preferences required by the Indian Self Determination Act. **Cf. Andrus v. Glover Construction Company**, 446 U.S. 608 (1980).

The Washington Supreme Court's decision below resolves an important question of federal law in a manner which conflicts in principle with this Court's decision in **Mancari** and which substantially undermines the clear congressional mandate of the preference provision of the Indian Self Determination Act.

First, the Washington Court concludes the preference provision is not absolute, but only "to the greatest extent feasible", and therefore the local school district is at liberty to select a better qualified non-Indian applicant where the Indian Education Act grant is conditioned on the school district utilizing the best available talent and resources. (**See**, 20 U.S.C. 241 dd(b)) On this basis, the Court sanctions an interpretation of "preference" which allows the School District to hire the best qualified person and only when an Indian happens to be equally qualified with a non-Indian does the preference come to play. Such an interpretation renders the statutory preference hallow, if not illusory, for ultimately, absent equal qualification, the Indian applicant will be hired only if deemed the best qualified applicant. Mr. Johnson urged below that if he was the only qualified Indian applicant the School District was required to hire him for the Indian Tutor-Counselor position. This interpretation, adopted by the trial court and anticipated by the HEW Division Director of the Office of Indian Education assigned to administer the

type of grants in question,[4] gives full meaning to the "greatest extent feasible" preference. Given the national scope of the Indian Education Act grant program, and the likelihood that other states and their local school districts will view the preference similarly, this Court should resolve these differing views and clarify the scope and application of this preference.

Secondly, the Washington Supreme Court determined that the definition of Indian preference requiring the hiring of a qualified Indian over better qualified non-Indians could not be imposed upon the School District since such condition was not set out in the grant, citing **Pennhurst State Sch. & Hosp. v. Halderman**, 451 U.S. 1 (1981). Reliance on **Pennhurst** is inappropriate as a means for fashioning a restricted definition of "preference" since, here, applicability of the Indian Self Determination Act preference to this grant is clearly and unequivocally required by the Act, the School District was aware of the requirement and advertized the position with it in mind, and also knew of the "permissable reading" of what the preference required according to federal officials. It applied a different definition of preference at its peril. In order to avoid the particular language of a grant from being

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[4]Mr. Hakim Kahn, Division Director, in a memo which was distributed to Central Valley School District, specifically warned that "a permissable reading" of the preference provision of the Indian Self Determination Act, 25 U.S.C. 450e(b), may require a minimally qualified Indian applicant be hired over a better qualified non-Indian applicant. (Ex. 18; RP 48-49) Subsequently adopted federal regulations required Indian preference for awards under the Indian Education Act. 20 U.S.C. 241 aa-ff (Supp. 1972). See, 45 C.F.R. 186.5.

seized upon to eclipse the clear intent of Congress in requiring preference "to the greatest extent feasible" this Court must clarify **Pennhurst**.

Lastly, there is reflected in the opinion of the Washington Supreme Court a concern that a definition of "Indian preference" requiring the hiring of Indians over better qualified non-Indian applicants would have constitutional implications. While the Court upholds the Indian Self Determination Act, it interprets it in a manner that "avoids the specter of racial discrimination which the United States Supreme Court has indicated would arise if the BIA concept of Indian Preference were applied outside the 'unique setting' of the bureau and Indian reservation environs". 97 Wn.2d at 429; App A at 27. This concern is predicted on language in this Court's **Mancari** decision. **Mancari**, 417 U.S. at 554. This is not the first occasion where the Washington Supreme Court has adopted a restricted view of Indians' substantive rights in light of equal protection principles. **See, State of Washington v. Washington State Commercial Passenger Fishing Vessel Association**, 443 U.S. 658, 672-73, Fns. 19, 20 (1979). The Indian Self Determination Act's preference provisions are constitutional. **Mancari, supra; cf. United States v. Antelope**, 430 U.S. 641 (1977). Although the Washington Supreme Court did not declare otherwise, its interpretation of the Indian Self Determination Act was affected by its stated views. Petitioner asserts the result is an erosion of the substantive rights created by the Indian Self Determination Act. This Court has the opportunity here to clarify the intent, meaning and scope of this Act's preference provisions, thereby resolving speculation on the constitutional issue and minimizing the prospect of non-uniform interpretation of the Act.

The Washington Supreme Court erred in reversing the trial court's finding of entitlement to Indian preference. The facts here involve a quintessential example of what Congress sought to achieve with the Indian Self Determination Act, **i.e.**, Indian school children at an off-reservation state school being tutored and counseled by persons of Indian heritage. However, not just one position and a few Indian children are at stake here. The Indian Education Act grant program is national in scope. The same preference provision of the Indian Self Determination Act involves federally funded **contracts** for the benefit of Indians. The Washington Supreme Court's ruling, binding in Washington, may likely have extra-territorial ramifications as secondary authority in light of sparse precedent in this area.

This Petition involves important questions of federal law which have not been, but should be settled by this Court. The decision of the Washington Supreme Court conflicts in principle with this Court's decision in **Mancari** and the clear language of the Indian Self Determination Act. This Petition should be granted. Rule 17.1(c), RULES OF THE SUPREME COURT.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Washington.

Respectfully submitted,

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